UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 23 CR 181 (RA)

DARIUS A. PADUCH,

Defendant. Trial
----------x

New York, N.Y.
April 24, 2024
9:15 a.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: MARGUERITE COLSON
ELIZABETH A. ESPINOSA
JUN XIANG
NI QIAN
Assistant United States Attorneys

BALDASSARE & MARA, LLC
Attorneys for Defendant
BY: MICHAEL BALDASSARE
JEFFREY HAWRILUK

(In open court)

THE COURT: Good morning, everyone.

I was going to supplement my rulings before we got started with *voir dire* this morning. But if there are any or issues, I know we were asked to come earlier today, as we are now. If there are any other issues you want to raise first, I'm happy to address those first and then get to my rulings, if you would prefer.

MS. ESPINOSA: Your Honor, we just have a number of housekeeping items we wanted to raise. We are happy to do it now or after your Honor's rulings, as you prefer.

THE COURT: Why don't I start with my rulings so that you have them. But if it seems close to when the jury pool is going to get here, then we will stop and address your issues.

I issued that order so you knew what the rulings were, but I do want to state my reasoning for the record. Again, I know it can be a little tedious to listen to oral rulings, but it's important to get it on the record as soon as possible.

So the government moves to admit evidence of defendant's other alleged sexual assault and abuse crimes, wrongs, and other acts, under Federal Rules of Evidence 413, 414, and 404(b), in addition to the seven victims specified in the indictment.

For its case in chief the government seeks to admit the testimony of at least seven additional victims of alleged

sexual abuse. It notes that beyond its case in chief it may seek to call seven other additional witnesses.

In support of its motion, the government argues that evidence of defendant's sexual assaults of nonstatutory victims is plainly admissible under Rule 413 and, with respect to victims 10, 20 and 25, also admissible under Rule 414. It further maintains that the evidence is also admissible under Rule 404(b), arguing that the evidence is highly probative of defendant's guilt and relevant to his propensity, character, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.

The government further moves to admit the testimony of two of defendant's former coworkers at a medical institution located on Long Island.

The first coworker, an ultrasound technician, is expected to testify about an instance where she says she saw the defendant manually masturbate a patient. During this incident the defendant allegedly told the coworker that he was masturbating the patient in order to induce an erection.

The second coworker is a human resources professional who was tasked with investigating the event described. She is expected to testify that defendant denied that he had masturbated the patient or that he used the phrase whack off with that patient.

The government seeks to admit the testimony of the

first coworker under Rules 413 and 404(b) and the testimony of the second coworker under Rule 404(b). Defendant meanwhile moves to preclude the government's introduction of this evidence under Rule 413. He argues that Rules 413 and 414 are not satisfied because defendant is not accused of a sexual assault or child molestation, as required by Rules 413 and 414(a), relatedly. He contends that the testimony of the first coworker is admissible because she did not in fact observe a sexual assault. In addition, he argues that the evidence should be excluded under Rule 403, contending that the low probative value of the evidence is substantially outweighed by the dangers against which Rule 403 is intended to protect, namely, unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative information.

For today the Court is only to address the seven plus additional witnesses the government wants to include in its case in chief, as well as the two coworkers. I'll defer ruling on the victims intended for beyond the government's case in chief until the government finishes presenting its case in chief and clarifies whether in it indeed seeks to introduce the testimony of any additional victims.

Defendant's motion on Rule 413 is granted in part and denied in part without prejudice. The government's motion with respect to the nonstatutory victims is granted in part and

denied in part without prejudice as well. The government's motion with respect to the two coworkers is granted. The government will permit the testimony of four nonstatutory victims and the two coworkers.

Rule 413 instructs that in a criminal case in which a defendant is accused of a sexual assault the Court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

Similarly, Rule 414 instructs that in a criminal case in which a defendant is accused of child molestation, the Court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

I'll start with defendant's argument that he is not accused of a sexual assault or child molestation as envisioned by Rules 413 and 414. I will use the term child molestation today, but, as I noted previously, I am not going to use it during *voir dire* or before the jury.

Although the defendant cites *United States v. Frank*, No. 04-CR-20778, 2006 WL 8434880, (S.D. Fla. Nov. 15, 2006), and *United States v. Courtright*, 632 F.3d 363, 368-69 (7th Cir. 2011) -- and, like before, I am not going to say the case citations, but I am going to have the court reporter add them in, unless there is any objection to that practice -- in

support of his interpretation of Rule 413, but I find more persuasive *United States v. Foley*, 740 F.3d 1079, 1086 (7th Cir. 2014), which reasons that Rule 413's emphasis is on whether the crime involved sexual assault. As the Court in *Foley* explained, the focus is on the conduct itself rather than how the charges have been drafted. This reason applies with equal force to Rule 414. Judge Furman similarly found this reasoning persuasive in *Boyce v. Weber*, 740 F.3d 1079, No. 19-CV-3825, 2021 WL 2821154, at *9 (S.D.N.Y. July 7, 2021), albeit with respect to Rule 415. Moreover, Judge Berman, in the *Hadden* case, rejected the argument that Rule 413 was inapplicable because the defendant was not charged with sexual assault in the indictment. So does this Court.

The question then is whether the alleged conduct constitutes sectional assault or child molestation as defined by Rules 413 and 414. The Court finds that it does.

Rule 413 defines sexual assault in part as a crime under federal law or under state law involving contact without consent between any part of the defendant's body or an object and another person's genitals or anus.

Rule 414 defines child molestation, in part, as a crime under federal law or under state law involving contact between any part of the defendant's body or an object and a child's genital or anus. This is precisely the conduct that is being alleged in this case.

Notably, as previously discussed, violations of New York Penal Law 130.55 underlying the Mann Act counts here, which makes it a crime to subject another person to sexual contact without the latter's consent. Under New York Penal Law 130.003, sexual contact is defined as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party, and a person is deemed incapable of consent when he is a patient and the actor is a healthcare provider charged with sexual abuse in the third degree as defined in Section 130.55, and the act of sexual contact occurs during a treatment session, consultation, interview, or examination.

In short, each count involves conduct that falls under Rule 413's definition of sexual assault, and the 2422(b) counts, which allege conduct against minors, involve conduct that falls under Rule 414's definition of child molestation. In light of these definitions, defendant's contention that the testimony of the first worker is inadmissible because she did not in fact observe a sexual assault also lacks merit.

The proffered evidence is also clearly relevant here. The government argues that the testimony of the nonstatutory victims is relevant because it will demonstrate defendant's propensity to allegedly (i) leverage his position of trust and power as a urologist at a premier medical institution; (ii) take steps to build rapport with the victims, including by

texting them over his personal cell phone and inviting them to spend time with him outside of medical institution 1; (iii) manually masturbate patients under the guise of medical care, often without warning or explanation; (iv) digitally penetrate victims' rectums while masturbating them or instructing them to masturbate; (v) probe victims' sexual preferences, masturbation habits and pornographic preferences; and (vi) prescribe medications that necessitated follow-up visits at which he abused victims. It further contends that the testimony will corroborate the testimony of the statutory victims.

In its April 18 letter, the government refined these arguments somewhat. In principle, it argues that the evidence is relevant in two ways.

First, it argues that the testimony of all the nonstatutory victims is highly relevant to the core issues before the jury, namely, whether defendant sexually assaulted the victims for his own sexual gratification and whether defendant induced the victims to return for follow-up visits in part so that he could commit the sexual assault. It notes that each of the nonstatutory victims will testify that defendant manually masturbated him and that almost all of them will testify that he did so during follow-up appointments.

Second, it argues that the specific details of defendant's abuse vary between victims, and, thus, the nonstatutory victims are necessary to corroborate specific

portions of the statutory victims' anticipated testimony. For example, it notes that only two of the nonstatutory victims, victims 11 and 12, will testify about defendant telling them that they were masturbating incorrectly.

Separately, as to the first coworker, the government argues that her testimony will be particularly powerful as corroborative evidence because, unlike the other instances of sexual assault, a person other than a victim witnessed the abuse.

In view of these arguments and the government's descriptions of the evidence set forth in its memorandum of law and letter, the Court finds that, and here I'm quoting from the Second Circuit's decision in the *Vickers* case, the proposed evidence of defendant's other alleged sexual assaults and child molestation crimes wrongs and acts is plainly admissible because it is probative of his propensity for committing acts of sexual assault and child molestation, including in a manner similar to that alleged here. The Court also finds that the proposed evidence is inadmissible because it is relevant to the jury's assessment of the victim's credibility. *See* the *Donaldson* case.

Defendant seeks a Rule 104(c) hearing seemingly under the theory that he must know the specific dates of the alleged assaults of the minor statutory victims to know whether Rule 414 is applicable. The Court disagrees. The specific dates of

the alleged assaults of the minor statutory victim are not necessary to prove that the minor victims were indeed minors when the alleged abuse occurred.

The testimony of the nonstatutory victims and the coworkers is also admissible under Rule 404(b). 404(b)(2) instructs that any evidence of any other crime, wrong, or act is admissible for purposes other than to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character. Admissible purposes include proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.

The government argues that the testimony of nonstatutory victims is admissible under Rule 404(b) because it's probative of defendant's idiosyncratic means and methods of abuse constituting a common scheme or plan, defendant's knowledge that certain victims would travel interstate for appointments with him and/or were under age, defendant's opportunity to commit the charged crimes by creating occasions to be alone with victims during exams and outside the clinical setting, defendant's intent and motive for sexually assaulting patients, including for the purposes of his own sexual gratification and desire and the absence of mistake or lack of accident.

As to the first coworker, the government argues that

evidence that defendant explained to the ultrasound technician, as he was masturbating a patient, that he was doing so in order to induce an erection in the patient, is extremely probative of defendant's intent as he allegedly touched and masturbated the statutory victims and of defendant's plan to manually masturbate patients.

As to the second coworker, the government argues that the evidence that defendant denied masturbating any patient at all is reflective of the defendant's consciousness of guilt and probative of the defendant's knowledge that masturbating patients was not in fact medically acceptable and would rather reflect the defendant's intent to do so for his own sexual gratification rather than any medical purpose.

In addition, it argues that evidence that defendant claimed to not understand the phrase whack off to refer to masturbation in his statement that he would not use such language to a patient is inadmissible under Rule 404(b) to show knowledge, intent, lack of mistake, and state of mind.

Furthermore, it argues that the evidence that defendant denied using this language is probative of defendant's consciousness of guilt and the fact that he did not mistakenly use crude and colloquial language since it comports with the sexual gratification he sought from masturbating and otherwise touching patients.

Defendant is correct that the government may not

invoke Rule 404(b) and proceed to offer carte blanche any prior act of the defendant in the same category of crime.

As the Court in *Garcia* explained, for the 404(b) evidence to be admissible, the government must identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge or the other admissible purposes.

In light of the government's description to the evidence set forth in its March 20 and April 5 memoranda of law and the just-recited explanations for how the evidence is probative it is inadmissible under Rule 404(b).

That said, the protections provided in Rule 403 still apply and the testimony of all seven nonstatutory victims would, in my view, be substantially more cumulative and unfairly prejudicial than probative.

As you know, under Rule 403, the Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: Unfair prejudice confusing the issues, misleading the jury, undue delay, wasting time, and needlessly presenting cumulative information.

Starting with the probative value of the evidence here, under *United States v. Spoor*, in determining the probative value of prior act propensity evidence, the district court should consider such factors as the similarity of the

prior acts to the act charged, the closeness in time of the prior acts to the acts charged, the frequency of prior acts, the presence or lack of intervening circumstances, and the necessity of the evidence beyond the testimonies already offer at trial. Applying the *Spoor* factors, the evidence appears to be highly probative. Specifically, there are sufficient similarities between the prior acts regarding the nonstatutory victims and the acts charged.

Similar to the statutory victims, each of the nonstatutory victims will testify to being sexually abused while a patient of defendant. More specifically, as the government observes, each will testify that defendant manually masturbated him and that almost all will testify that he did so during follow-up appointments. In addition, what the first coworker purports to have observed is also sufficiently similar to what the alleged victims allegedly experienced. That the first coworker worked at a different medical institution than the one visited by the victims in the indictment does not change my analysis.

The alleged acts are also within the relevant temporal scope. The allegations in the indictment span from 2007 to 2019. The allegations of the conduct committed against the nonstatutory victims fall within that time range. The conduct that the first coworker allegedly observed, which occurred in late 2020, is not far outside that range. Also, given the

number of nonstatutory victims, the frequency of the prior acts also appears to be high.

Finally, the Court is not aware of any intervening circumstances that diminish the probative value of the others. Likewise, the evidence is highly probative 404(b) evidence because of the close parallel between the crimes charged and the acts to be shown by the evidence. *See* the *Curley* case.

Let me now move to whether the probative nature of the evidence is substantially outweighed by the dangers specified in Rule 403. I am going to begin with the danger of cumulativeness, which I find to be the most significant danger here. Based on my examination of the law, I do not believe that there is a maximum limit on the number of witnesses who can testify under Rule 413 and 414. *See* the *Never Misses a Shot* case. At the same time, however, the witnesses inject cumulative evidence with little additional probative value when viewed in the aggregate. *See*, again, *Never Misses a Shot* at 1028. In other words, the marginal return on each additional witness' testimony starts to diminish.

In the *Perrault* case the introduction of testimony from seven witnesses gave this Tenth Circuit pause. In *It Never Misses a Shot*, the Eighth Circuit was troubled by the admission of testimony from six witnesses. Indeed, in many cases, including the *Shaw* case, *Kindley* case, *Carter* case, and *Crow Eagle* case, courts limited the testimony of witnesses

under Rules 414 and 413 to three or four. The Court finds those cases persuasive and it also finds the approach persuasive with respect to evidence admissible under 404(b).

This case involves seven victims squarely referenced in the indictment, as I noted. The government seeks to introduce testimony from at least seven nonstatutory victims. Based on the government's proffer, the testimony of the seven victims will be similar in kind to the statutory victims. Like the statutory victims, each of the nonstatutory victims will testify to being sexually abused while a patient of defendant.

More specifically, as the government observes, each will testify that the defendant manually masturbated him. Almost all will testify that he did so during follow-up appointments.

To be sure, I appreciate the government's argument that specific portions of the nonstatutory victims' anticipated testimony corroborates specific details of certain nonstatutory victims' testimony, since the way the alleged abuse was carried out varied, but that does not erase the aspects of the proffered testimony that will still be very similar, and, thus, my concern is, again, about their cumulative nature, and at this point I don't find the additional testimony necessary in light of that.

In view of the similarities, the Court will allow four of the nonstatutory victims to testify. The government may

choose the four nonstatutory victims it wishes to call. I find that with four nonstatutory victims testifying the risk of cumulativeness will not substantially outweigh the probative value of the proffered evidence. The Court will also permit the two coworkers to testify. Here, I note that the first coworker may have observed alleged sexual abuse. While she may have done that, she did not, as the nonstatutory victims did, experience it herself as a patient during purported treatment.

The testimony of the second coworker differs in that she neither witnessed nor experienced any masturbation. Accordingly, her testimony is not being offered under Rules 413 or 414. Unlike the other witnesses, moreover, the second coworker interacted with defendant through an investigation rather than in a treatment setting and, unlike the other witnesses, the coworker will testify about his denial of use of crude language and masturbating the patient.

As to the two coworkers, the risk of needless cumulativeness will not substantially outweigh the probative view of the proffered evidence.

I also find that the probative value of the evidence I have declined to exclude is not substantially outweighed by danger of unfair prejudice, as the Second Circuit said in *Schaffer*. The fact that evidence may be highly prejudicial does not necessarily mean that it is unfairly prejudicial and, as in *Schaffer*, I find that the evidence described will not be

more inflammatory than the conduct for which the defendant is being tried.

Given the number of witnesses I'm permitting to testify, I find that I have adequately limited the risk that the prior-act evidence will lead the jury to convict out of passion or bias or because they believe the defendant is a bad person deserving of punishment. I'm prepared to give a limiting instruction to reduce the risk of prejudice. If you want to propose language, feel free to do so, but please do it in advance.

As to the risks of confusing the issues and misleading the jury, I'm unpersuaded by the citation to the *Guardia* case. I'm also unpersuaded by defendant's argument that the jury will be confused or misled by the fact that the coworker's testimony will relate to an incident that occurred at a different medical institution in 2020. I also don't see any merit in this argument that the unknown identity of the patient involved in that incident will confuse the jury. In short, I find little risk of confusion or misleading the jury.

In addition, I don't find there to be significant risk of undue delay or waste of time. The government has represented, for instance, that it intends to introduce limited testimony from the coworkers. If I find that as the trial proceeds the risk of undue delay or time wasting have grown, I will direct the government to tailor its line of questioning.

Finally, I, just on this issue, want to make clear that the government may renew its motion to admit additional nonstatutory victims, should evidence presented at trial call for the Court to reassess its ruling. It may be that evidence is presented that changes my assessment of whether evidence is substantially more needlessly cumulative or unfairly prejudicial.

That's my ruling on that.

When can you inform defense counsel of which witnesses, which four nonstatutory victims you intend to call?

MS. ESPINOSA: Your Honor, yesterday we gave him a list of five from which we will be selecting. The government intends to make a final decision as we see how the beginning of the trial plays out so that we can determine exactly who to call, but we have given him five, and four will be selected from this group.

THE COURT: I have a couple more rulings, but I just want to hold off just to make sure that we talk about things that are more time pressing.

MR. BALDASSARE: Your Honor, there is just one thing I want to clarify.

Your Honor mentioned you were withholding onto one -- at the very beginning of what your Honor read, that you were withholding as to one ruling.

THE COURT: Because the government said, there is

seven nonstatutory victims that they seek to call in their case in chief, but there are others that they may seek to call, which I assume meant on rebuttal. I'm not dealing with any rebuttal issues now.

MR. BALDASSARE: Yes, Judge. Thank you.

THE COURT: I'll read my rulings which, just for the record, are shorter, as to the iCloud note, the URL and the other pending issues, but I just want to make sure before the jury pool gets here that we talk about some logistical issues in jury selection.

If you want to go ahead with your issues, I'm happy to do them first.

MS. ESPINOSA: However your Honor prefers.

THE COURT: Let me get through these, and then we will hear from you.

Let's just talk about jury selection for now, and then we will come back to the other things.

I know we discussed the jury selection process at Friday's conference, but I just want to go over it one more time because I was just thinking through the logistics based on your requests.

I plan to hand out the questionnaire as I said, walk through it with the first juror, and then ask whether any of the other jurors answer yes to any of the questions, and then we will inquire further.

Each juror will, number one, have the proposed questionnaire but also have -- and we made them in pink, the list of patient and patient family list.

With regard to exercising peremptories, I think the following process will be the smoothest. The 12 jurors will be chosen from potential jurors numbered 1 through 28. We had talked about maybe if you didn't exercise all of your peremptories, if the jurors who may be prospective jurors, number 27 or 28 or whoever at the end of that go to the alternate pool, I actually think it's cleaner to just have two pools.

We are going to have prospective jurors 1 through 28 be in the prospective juror pool, and the alternates will be chosen from potential jurors number 29 through 36. So even if you all don't exercise all of your peremptories, with the alternates we are going to be looking at 29 through 36.

Is everyone OK with doing that?

MS. ESPINOSA: Yes, your Honor.

MR. BALDASSARE: Yes, Judge.

THE COURT: We will have questioned all 36 prospective jurors by the time you are making these decisions, to be clear.

Then we had talked about the order of going back and forth. I think that since we are going to basically have you come up and look at the board and take turns with the board, looking at the names of the jurors on the board, I think that

what makes sense -- again, the government will have six peremptories with respect to the 12 jurors and the defendant will have 10, and then each side also gets 10 more peremptories for the four alternates.

Given the defendant has more -- sorry. I misspoke. Two more. Excuse me. Two more each for the four alternates.

Given that the defendant has more peremptories, he is going to go first. So for the 12-person jury he will have the opportunity to exercise two peremptories. Then the government is going to come up, look at the board. The government will exercise one peremptory. Then it will go back to the defendant for two, back to the government for one, the defendant has two, the government has one, the defendant has two, the government has one. Then the defendant has one, the government has one, the defendant has one, and the government has one. We are just going back and forth.

For the alternates we are going to also go back and forth with one peremptory at a time.

Then you will be able to look at the board and see that everyone agrees. We will excuse the jurors who have been struck. We will have them stand in the back of the courtroom, and I'll ask you all if this jury is acceptable to everyone.

That's how we are going to do it. Obviously, there will be sidebars as appropriate, and we will deal with sensitive issues at sidebar.

I did want to make one just quick disclosure before we proceed. One of my law clerks informed me that one of the medical records, GX-206 on the government's exhibit list received last night, belongs to an individual that attended my law clerk's high school. The patient is not on the witness list. My law clerk has informed me that the patient was not in their grade and that they haven't spoken to them in over a decade. But I did just want to make that disclosure for the record.

Why don't I hear from the government what issues you'd like to raise, and then we will proceed from there.

MS. ESPINOSA: Thank you, your Honor.

First, we wanted to put on the record that in this case a plea offer was extended to the defendant. On January 5 of this year, the government extended the defendant a plea offer to one count of 2422(a), which is enticement across state lines. It carries no mandatory minimum and a 20-year statutory maximum sentence. The defendant rejected that plea offer.

THE COURT: I am going to ask Dr. Paduch.

Was that plea offer relayed to you and did you discuss it with your attorney?

THE DEFENDANT: Yes, and I read it.

MS. ESPINOSA: Thank you, your Honor.

THE COURT: I also actually want to ask just one more.

Mr. Baldassare, did you discuss with Dr. Paduch

whether he intends to waive his right to be present for sidebars?

MR. BALDASSARE: Yes, Judge, and he is.

THE COURT: He is waiving his right?

MR. BALDASSARE: Yes, he is waiving.

THE COURT: That's both during *voir dire* and during the course of the trial?

MR. BALDASSARE: Yes, for both.

THE COURT: Thank you.

MS. ESPINOSA: Your Honor, the government has discussed with defense counsel that we intend to introduce certain records pursuant to certifications under Rule 902. We understand from those conversations that defense counsel has no objection to that. I'll let him clarify if there is any difference. But our understanding is, they are not objecting to admissibility of those records under the certifications.

MR. BALDASSARE: Yes. There is a lot flying, but I made it clear to the government the ones, which may have been all of them, and I think the government is representing that correctly.

THE COURT: Thank you.

MS. ESPINOSA: The government also wanted to address the Court's order from yesterday about Dr. Strange and the basis for cross-examining certain witnesses.

Now, it's the government's view that defense counsel

can properly inquire into whether or not the victims learned the facts of their abuse through some other source or discussed that.

But one thing we do want to be aware of is that many of these victims are represented by civil counsel, and we want to be cautious of any questions that would necessarily require victims or would get into attorney-client privileged conversations between those victims and their counsel.

While we have no objection, we think it's proper to cross-examine them about the source of the information that they are testifying to today, we want to avoid needing to needlessly object to questions that stray into attorney-client privileged conversations. We would ask that defense counsel attempt to formulate those questions to get at the facts, rather than any legal advice, legal strategy between counsel and client.

MR. BALDASSARE: Judge, on that issue, I think a witness knowing a fact is fair game. I think how they came to learn that fact, if it was the lawyer, isn't, because it is not fair game because it's protected by the privilege. Sussing out how they got that fact, I am going to have to figure out a way to do that, which may be a question like -- I don't know. If I ask, is the source of that information other than your lawyer, well, that answers the question in a way that the government is not going to be happy with, but I'm open.

MS. ESPINOSA: I think, your Honor, an option simply could be, as a source of that information, anyone other than yourself, any other individual and, depending on the answer, if counsel could inquire further. If we have any reason to think that we are getting into dangerous territory, we can address it.

Maybe I'm misunderstanding this issue, but my sense is that defense counsel is seeking to inquire of anyone else who has influenced the memories of these particular victims. It is less important to exactly who that other individual is.

MR. BALDASSARE: I don't think the question can be limited to, is the source anyone other than yourself. I can think of at least two who have a source that is other than the attorney. So I think -- I don't think it's fair to say -- I can't ask, was it other than yourself. I could ask, was the source of that information X. I'm not going -- then I won't ask -- for example, if let's just say I'm the witness and Mr. Hawriluk, who is not my lawyer, was the source of the information, I think I could say, isn't it true that the source of your information, Mr. Baldassare, was this guy Jeff. I think that's fair because people don't always learn things just from themselves, and in fact in this case they didn't.

THE COURT: Do you have any problem with that? I think it seems fair to ask specific questions of, was it this person if that person is not the lawyer. But if it's a more

open-ended question and you are not asking about a specific person other than the lawyer, I think it should be more open-ended.

MS. ESPINOSA: I think that's fine, your Honor. I think where we want -- we are merely trying to avoid questions that would call for an answer that necessarily gets into attorney-client conversations.

MR. BALDASSARE: Yes. And it would also matter, I think, if there was an attorney conversation, whether there were third parties there who would blow the privilege, as we say, colloquially. But I am going to be careful with the privilege, Judge.

THE COURT: Let's all be sensitive to this issue. Thank you for raising it.

MS. ESPINOSA: Your Honor, just a couple of more things.

We would ask that the Court, if a sketch artist attends, and I don't know that they will, we would ask that the Court direct them not to sketch the victims' faces, which we believe is customary in cases of this nature. I don't know that one will attend.

THE COURT: Yes. If you see -- obviously, we will all see them, but call it to my attention, and I'll make sure that my deputy speaks to that individual.

MS. ESPINOSA: We would also ask the Court each day to

just remind everyone to not, including any members of the press who are present, to not print any victim's real names other than those who are testifying under their real names if they consent. If they are inadvertently mentioned, we are all going to do our very best to avoid any slips, but every now and then sometimes mistakes are made. We would that ask the Court issue a reminder.

THE COURT: If there is a slip, you'll let me know and then I'll announce it. But if there isn't, I won't say anything.

MS. ESPINOSA: That's fine, your Honor.

Thank you.

One last item from us. Understand we received a witness list from the defense. We are just going to put this on the record. We have begun discussions with him. We have received a witness list from the defendant of a number of witnesses he would like to call from Northwell. And I think that in advance of that we would like to discuss with him the relevance and admissibility, nonhearsay testimony those individuals would like to offer, and we have suggested to defendant that prior to opening, if he intends to open on anything related to those Northwell witnesses, we would like to discuss the relevance and admissibility of that evidence.

THE COURT: Let him respond on this issue.

MR. BALDASSARE: I usually don't like giving a preview

of anything, but in this case I think it's a fair request. So I am going to look through -- because it really comes down to, Judge, what's in Ms. Williams' report. And if I find something in there that I think is fair game and that isn't hearsay, because it's simply not hearsay or because it's not hearsay due to an exception, I'm happy to raise it for the Court, and I'll only open on what the Court says.

If I could ask, because I was scribbling -- if there is a slip, obviously, number one, I am going to be very careful and, number two, I really can't envision talking to the press. And if I do, I am not identifying any of the individuals who are testifying under pseudonyms, nor will I identify the people who are not testifying under pseudonyms, even if they choose to speak to the press in their own names. It's just not something I'm interested. It's just not my style. And the last question was, there was something said, and I just didn't get it.

After the ACP, the privilege, there was something either about pictures or identifying them. I didn't get that one.

MS. ESPINOSA: Your Honor, just to clarify, sometimes a sketch artist may attend. And in cases where victims are testifying, routinely the sketch artist obscures the face of the victim or does not sketch the victim.

THE COURT: If we have a sketch artist, we will just ask the sketch artist to obscure the face of the victim.

MR. BALDASSARE: That's fine, Judge.

MS. ESPINOSA: I have one more quick item, your Honor. We are happy to discuss further with defense counsel, but we understand that defense counsel has added a private investigator to the names and places list, as well as marked a number of emails, as potential exhibits from that private investigator to attorneys for the victims.

At this time we don't see a relevant or nonhearsay basis for any of those to be admitted. We are happy to discuss further, and defense counsel can bring any to our attention, but we would ask until that issue has also been sorted out, defense counsel not open on anything from the private investigator.

MR. BALDASSARE: Judge, I think that the documents I have given them are fair game for opening. They are clearly business records. I just think that they are fair for opening. I just disagree. I'm happy to tell you what they are.

THE COURT: Tell me what they are.

MR. BALDASSARE: They are emails from our private investigator requesting, and we tried to do this in the most professional way possible -- they are emails requesting from the lawyers for the former patients. Today I understand, even though I object, we are using victims for shorthand. They are emails from our investigator to the alleged victims asking if they will sit with us. To the extent that no response was

received or in other cases we were told flat out no, we will not sit with you, but we are willing to sit with the government 17 times, I think that goes to bias, and I think it's fair game, and I think it's an email that the jury should see.

MS. ESPINOSA: Your Honor, we, of course, have no objection to me inquiring of the victims whether they met with him, eliciting the fact that they did not meet with him. I would note that some of these emails are to -- I believe they are to counsel for the victim. There is no evidence that any of the victims saw or even were aware of these emails.

I think it is certainly fair to cross on the fact that they did not meet with the defendant. I don't think that an email from the investigator to an attorney is -- the fact of an email conceivably could be a business record. But the substance of any email would not be a business record, and we don't think that it is --

THE COURT: We are not having any exhibits shown to the jury on opening anyway.

Were you intending to read the email or were you just going to get out the fact that they were unwilling, in your view, to meet with you or someone from your office or the investigator?

MR. BALDASSARE: Here is what I would say about that, Judge.

Number one, I'm in a tough spot, right, because I

can't violate the ethics rules and go to people I know are represented by counsel. I can't do it. When I talk to -- for example, a specific example, our investigator very early on contacted someone. I got a call from Mr. Fishman at Fried Frank -- Paul Weiss. I always get that messed up -- from Paul Weiss. He said: Mike, I'm sure this was inadvertent. I represent that person, this person, this person.

So I have to go to the lawyer. So it can't be, I went to the lawyer and I didn't go to the victim. I am not allowed to, number one.

Number two, the fact -- I get that the government would like to not use this exhibit because they think I can get the information out a different way. Well, that just reminds me of the age-old argument, when a defense attorney sees something they don't like and says to the government, I'll stip to that and the government says no. We don't want a stip.

THE COURT: Back to my question. Just for purposes of opening today, were you intending to read from the emails, or were you just going to get out the fact that certain people were unwilling to meet with your investigator or your office?

MR. BALDASSARE: No. I wouldn't read from anything that's not in evidence. The short answer is, the latter.

THE COURT: It's not really an issue for openings, to the extent we get to openings today. But it sounds like it will be an issue for cross-examination.

MS. ESPINOSA: Perhaps, your Honor.

THE COURT: I would like to see the email. If you want to be heard further on it, I'm happy to hear you further. The emails that I understand were sent to a host of different folks.

MR. BALDASSARE: Yes. And as I sit here, I believe we would have to probably redact because we weren't sure -- for example, in the Weill Cornell email, I don't know if we knew or to the attorneys for the alleged victims, I think we may have -- I don't remember if we used the real name in there or the alias, because we weren't sure if they had it. Obviously, if our investigator says, we want to interview these people, and we used the real names, obviously, we are going to redact that.

THE COURT: How are you going to authenticate the emails, if they weren't sent to the victims themselves, on cross with the victims.

MR. BALDASSARE: Because they are business records of our investigator, and I have no choice but to -- I have no choice. Obviously, I know the Court knows I have a right to investigate and present a defense. Under the law, I have to go to the lawyer unless I want to violate the RPCs.

I would respectfully say, I can't be hamstrung in those constitutional rights and say, do you go -- did I go? I'm happy to do it. I'll call my investigator and before lunch

I will find -- because I have them, I have the email for every single alleged victim. I have the home address for every alleged victim. I have the phone number not only for every alleged victim but for the minors, for their parents. And if the government and the Court wants me to send out a wave of will you sit with us, but I don't see how -- I think that's exactly what they wouldn't want.

MS. ESPINOSA: Your Honor, respectfully, I think that perhaps defense counsel is missing the point. We have absolutely no objection to him eliciting from the victims that they did not meet with him, and in fact in certain cases, if they refused to meet with him, that is also certainly --

THE COURT: Or if someone from his office or his investigator reached out to them, that's OK too as well.

MS. ESPINOSA: Yes, your Honor. They may or may not know that outreach was made.

What we are objecting to is the process of a authenticating and admitting the emails themselves, not the underlying facts, which I believe are the key point here, which is that they refused to meet or did not meet with defense counsel.

THE COURT: Your basis is what?

MS. ESPINOSA: Our basis for the emails is that we believed that they -- we believe that it is not properly admitted as a business record because it is testimonial in

nature.

MR. BALDASSARE: Judge, business records are exceptions to the hearsay rule, number one.

Number two, those statements by the lawyers are not hearsay because they are statements from an authorized representative. The lawyers should have thought about what they said before they didn't. They don't want the jury to see them, respectfully, because looking at something in a visual world, now more than ever, is powerful evidence than just, I reached out. It also ensures the credibility of a defense investigator that it happened.

I see no reason why she can't authenticate it as a business record. There are at least two exceptions to the hearsay rule. And also I have no other way to do this. And I don't want a situation where somebody says, oh, I don't remember that, or I didn't hear from that. I know this is never a compelling argument, but I sometimes see it work for the government. I have never had an issue with putting in these. They are business records, they are statements from authorized representatives, and they are the only way I can get them.

I understand that the government would like just the testimony. I want the exhibit. It's important for the jury to see it because it goes to bias.

THE COURT: Give me a couple of examples of those so I

can take a look at them, and I'll rule by tomorrow morning in advance of any testimony.

MR. BALDASSARE: Yes, Judge.

THE COURT: Are there any other issues?

MS. ESPINOSA: Not from the government.

MR. BALDASSARE: Judge, I have a couple of them.

We will have to do and submit a new order for MDC. I am going to talk to the client today to see what we think is -- quite frankly, what we think is reasonable and even to be fair to MDC. I don't know what's going to happen during a trial day. Obviously, we will have some sort of an order in place for the weekend. To the extent that that order is in play for today, or until we get a new order, we understand that there is no way to comply with it.

THE COURT: Why don't you talk to the government about that, ideally submit a proposed order, and the government can also coordinate with folks at the MDC to make this move smoothly, hopefully.

MR. BALDASSARE: Judge, just for the witness or the individual that I think it was GX-207, who went to high school I think with the law clerk, I'm happy to accept whatever representation or info the Court can give as to whether there is any likelihood, from being in clubs or the same group or anything, that somebody could recognize somebody. I understand they have not been in school for 10 years and that they were in

a separate grade. But I think if you ask and tell us no, I'm fine with that.

THE COURT: What I understand, what my law clerk said to me is that they would recognize the person. So it's not that they wouldn't recognize each other or that they don't who each other are. But they have not been in touch for 10 years and were never close friends or anything of that nature.

MR. BALDASSARE: Do we *voir dire* that individual on it?

MS. ESPINOSA: Your Honor, if I may, the government is not intending to call that witness at trial at this time, so I think that should moot the issue.

MR. BALDASSARE: That was easy.

THE COURT: We have jurors.

Are there any issues related to jury selection?

MR. BALDASSARE: Yes. Just one.

THE COURT: Sure.

MR. BALDASSARE: I hate to beat a dead horse, but it has never stopped me before. I still have concerns about how the Court, respectfully, intends to handle questions like question 2 because I understand that the Court is going to say, do you have yes to any of 1, 2, or 3? And my concern is that someone could read -- by the way, the commercials, the media, continue to this day -- is somebody could 2 to say: Have you ever heard, etc. Their answer could be yes. But the final

question they could say: Well, I think I could be fair.

THE COURT: As I said, I am going to break them down. I am going to ask one question at a time. And then I am going to make clear that if you have any answers, even if your ultimate answer is that it won't affect your ability to be fair and impartial, I still want the answer to the first question. So even when I go to prospective jurors number 2, 3, etc., I am going to be making that clear.

MR. BALDASSARE: My only concern was, I think the Court is only reading the question to prospective juror 1, but if the Court is going to say exactly as you did, even if your ultimate answer regarding the ability, if you have a yes answer to a preceding question, we can then suss it out that way.

THE COURT: Yes. It even says that in the questionnaire. It says: Please indicate if your answer to any of the questions or sub-questions is yes, so I'll highlight that.

MR. BALDASSARE: Thank you, Judge. We have nothing further.

(Jury selection under separate cover)

THE COURT: So I understand that there is a for-cause challenge for Ms. Thottam, for Prospective Juror No. 31, the one that we just spoke about at sidebar. I understand there is a for-cause challenge.

I'll think about that overnight. I'm going to look back at the transcript. I'm going to think about it. I'll let you know in the morning. As is, she's coming back tomorrow.

Is there anyone else, any other for-cause challenges among these folks?

MS. QIAN: Not from the government, your Honor.

THE COURT: OK.

MR. BALDASSARE: No, Judge. I just remember there was --

THE COURT: Bring the microphone a little closer, please.

MR. BALDASSARE: Yes.

Judge, I don't know if it was for cause, but there is one juror who has the daughter coming home.

THE COURT: Yes.

So that was the lawyer, Ms. Danzillo, I think. I don't know if that is who you're talking about, Prospective Juror No. 10.

MR. BALDASSARE: Yes.

THE COURT: So initially, when she talked to us, she said, you know, that she had something on May 9, and then a

graduation on May 16 and May 26.

But then towards the end she made it seem like, you know, her daughter is coming and she has more conflicts. I don't know that she can't get around them, but I'm happy to hear you out, if you are asking that she be excused.

MR. BALDASSARE: Well, I would just kind of defer to the court. As to the government's position, it just sounded to me like when she did get back in the box, somehow now the rollup to May 9 with her daughter's coming home may cause her to be distracted.

I think it did change from sidebar to up there, but it seemed a lot more -- seemed like she really didn't want to be here or run that risk an awful lot more when we were questioning her in the box.

I don't know if anyone else had that perception.

THE COURT: No, I had the same perception, but I don't know that that means we shouldn't keep her.

I'm happy to hear the government out.

MS. QIAN: Your Honor, we have no preference on this issue. We understand that she has a hard conflict on the 9th, which I think we can deal with. The other something she mentioned about her daughter coming, sounded like things that could, you know, be worked around.

But we also, again, have no strong preference on this point.

THE COURT: I think so, too. I think we leave her for now.

I'll consider that one for-cause challenge starting at ten tomorrow, go through the questionnaire with the 30 jurors tomorrow.

Is that right, Allison?

THE DEPUTY CLERK: Approximately.

THE COURT: Approximately 30 jurors tomorrow, Hopefully that will fill the remaining spots. That is all they had, frankly, because of the Passover week.

THE DEPUTY CLERK: If we don't get it tomorrow, we have to resume Monday.

THE COURT: If we don't fill them tomorrow, we have to resume on Monday.

They unfortunately don't have any other prospective jurors coming until Monday.

MR. XIANG: So, your Honor, if we're in the contingency where, based on the jurors available tomorrow, we, you know, we can't qualify 36, I think the government's request at that point would be that we lower the number of alternates in order to be able to impanel a jury and begin this week.

I think I mentioned before, we have very serious concerns about witness availability going over the next couple days.

THE COURT: Do you have a view on that?

MR. BALDASSARE: No, Judge.

THE COURT: OK. So why don't we see.

We'll keep our fingers crossed, hoping we can get at least three alternates, which I think frankly would be fine anyway. But why don't we see how things go in the morning, and we will keep Prospective Juror No. 10 for now, Ms. Danzillo.

I think the only other thing that, I just want to say a few things, and then we'll adjourn for the day. But I just wanted to finish my rulings. This should be a lot shorter than this morning.

So the government's Daubert motion regarding Dr. Strange is pending. It was filed recently, you know, because of the late notice. And per my order of yesterday, the defendant's response is due Monday at nine.

Given that it's pending, I'm only going to permit the defendant to open on portions of her expected testimony to which there is no objection.

OK. Is there an issue with that?

MR. BALDASSARE: No.

THE COURT: OK. All right. I mean, the government does not object to her opinions regarding how memory works generally, including trauma memory.

That's my understanding, correct?

MS. QIAN: That's right, your Honor.

THE COURT: OK. I'm not going to decide the

government's Daubert motion until I receive the defense response, but because we will likely hear from witnesses before then, I will, consistent with *Maxwell*, allow defendant to ask questions about activities or events that he believes led to false or distorted memories.

We're all on the same page with that and OK with that?

MS. QIAN: Yes, your Honor.

THE COURT: OK. Then with respect to the motion to admit the defendant's iCloud note, in which he in part describes some of his sexual fantasies to his then boyfriend, now husband, I deny the government's motion.

As explained in the final pretrial conference, although the iCloud note mentions watching pornography with his partner, masturbating together, and stimulating his partner's prostate, which in some ways mirrors the alleged assaults, in the note he also describes how his flight was, his romantic feelings towards his then boyfriend, and his desire to set up two friends on a date.

The government argues that the note is a catalog of the ways in which defendant sought sexual gratification. In particular, defendant's note to his then boyfriend states: I want to watch the most secret porn with you which you would normally not share with anybody. Your dirty little porn fantasy. I want to get Fleshlight vagina and vibrator and try on you and myself, and we jerk off each other. I want to

massage your prostate and your butt as you jerk off and see if you like it. I want to come home and see you continue jerking off to your porn.

The government organizes that such fantasies mirror the alleged acts of assault because defendant allegedly directed some of the victims to watch porn, told some victims to purchase a fleshlight, used a vibrator on some victims, and performed prostrate massages on some as well.

The court finds the note, which outlines different sexual practices defendant sought to engage in with his then boyfriend, as well as discussions -- sorry, as well as discusses a myriad of other non-sexual topics, to be of limited probative value as to defendant's motive or intent regarding his conduct towards his patients.

In any event, to the extent that it is admissible under 402 and 404(b), any probative value is substantially outweighed by danger of unfair prejudice. In an effort to diminish the prejudicial nature of the note, the government proposes admitting an excerpt of the note, which would omit any discussion of non-sexual topics or references to defendant's then boyfriend, but the court finds that doing so would only increase the danger of unfair prejudice. I'm excluding the note pursuant to Rule 403.

The government further moves to admit a URL found on one of defendant's devices entitled Doctor Fucking Teen. For

the same reasons discussed by the court in admitting what it referred to as doctor-patient pornography, the court grants the government's motion regarding this URL. Indeed, the URL describes conduct that is substantially similar to the conduct at issue, and the similarity between the other act and a charged offense will make the other act highly probative as to defendant's intent in a charged offense.

Defendant argues that the government's motion should be denied because the video underlying the URL is no longer available. However, evidence need not be conclusive in order to be relevant. Nonconclusive evidence should still be admitted if it makes a proposition more probable than not. Factors which make evidence less than conclusive affect only weight, not admissibility. Accordingly, the fact that the government has not produced the actual video may go to the weight of the evidence does not bar admission. See the *Hite*, H-i-t-e, case. Indeed, other courts admitted evidence of the defendant's search history. See, for example, *United States v. Ingram* and *United States v. Hite*.

The URL is thus admissible pursuant to 404(b), being probative of defendant's motive and intent. Nor is the probative value substantially outweighed by danger of unfair prejudice. The URL is not worse or more shocking than the charged conducts. So the government's motion is granted.

And finally, the government moves to admit sexually

explicit photos that defendant appears to have taken of himself at a Medical Institution 1. The government's motion is denied. This was admittedly a very close question in my view, and there is probative value in that the evidence suggests the defendant was sexually aroused at work. However, on the whole, the court finds that the probative value of these photographs is substantially outweighed by danger of unfair prejudice with regard to the photographs numbered 603 and 607. The court finds them to be of limited probative value given the gap in time between when the photographs were taken and the closest patient appointments. Photographs 603 was taken at 7:48 a.m., more than an hour before defendant's closest appointments. Photograph 607 was taken at 10:30 a.m., the closest appointments being 8:30 a.m., two hours later and then 11:00 a.m.

Photographs 601 and 606 potentially have a closer nexus in time with a patient appointment. However, the government is not represented any of the photographs were taken near in time to an appointment where abuse is alleged to have occurred. The court is also not been provided with any information regarding what occurred during the relevant appointments. Indeed, the court does not know, for example, whether, for how long, or in what way defendant physically examined the patients during those appointments. Moreover, none of the relevant appointments for any of the photographs

were with a statutory or nonstatutory victim, nor has the government represented that any of the photographs were shown or sent to any alleged victim.

In my view, the photographs are of substantially more prejudicial -- are substantially more prejudicial than probative. As I explained in the final pretrial conference in the *Hinkel* case, the First Circuit considered the district court's admission of photographs which demonstrated the defendant's sexual practices, some of which showed his erect penis, and the court held that, in most circumstances, the prejudicial impact of these photos would be patent and substantial. That's from *Hinkel*.

The court thus excludes these photographs pursuant to Rule 403. That said, if there is other information which increases the probative value of these photographs or if the defendant testifies and opens the door to them, the government may renew its motion.

Just lastly, I briefly want to address my ruling regarding the government's motion to preclude cross-examination of Victim 7, about his encounters with is a sex surrogate after concluding treatment with defendant, which I granted.

When I made that ruling, I was not aware of numerous text messages between the defendant and a patient suggesting that defendant himself may have acted as a sex surrogate for that patient. I'm referencing pages 119 through 127 of

Government Exhibit 410.

So do these text messages pertain to Victim 7?

If you don't know offhand, you can tell me.

MS. QIAN: They do.

Government Exhibit 410 are the text messages between Victim 7 and the defendant.

THE COURT: OK. I mean, I feel like this additional context makes a difference, and I would like to hear you out on that. Because it seems like here, what he's talking about is defendant himself acting as a sex surrogate. If that is going to come in, I don't know why it would be so prejudicial to have any other form of sex surrogacy.

MS. ESPINOSA: Your Honor, we're recalling the messages you're referencing. The defendant is not a sex surrogate and I don't believe explicitly claimed to be a sex surrogate.

Now, there were text messages during the time when Victim 7 was still seeing the defendant in person that discussed sex surrogacy. The Victim 7 did not see a sex surrogate at that point in time. He later did, but that was after he was no longer seeing the defendant for treatment, and the defendant was not that sex surrogate.

THE COURT: OK. But are these texts going to come in about sex surrogacy, the texts back and forth between the defendant and Victim 7?

MS. ESPINOSA: Yes, your Honor. And we have, to be clear, we aren't objecting to him being crossed on those particular messages. I think what we think is less probative and more embarrassing for the witness is whether or not he, in fact, went to see a sex surrogate later in time after he stopped seeing the defendant.

THE COURT: OK. Do you want to be heard on this?

MR. BALDASSARE: Yes, Judge.

So what I'm hearing is we want the messages in where they talk about sex surrogate. We want to tell the jury that he's not a sex surrogate, but we don't want to tell the jury that after he left Dr. Paduch's care, he asked him about sex surrogacy, he went to a sex surrogate, and then said it really helped.

So, on the one hand, I had been originally, right, the question and answer you remember was going to be: Did you seek him -- did you seek medical advice from Dr. Paduch on a medical course of treatment? And, you know, the answer likely would be yes. Did you do it? Yes. Did it help? Yes. But if we're going to have, you know, the sex surrogate, and then it's going to be, Oh, and he wasn't one. At some point, I get that things are embarrassing. I'm trying to be respectful.

But we are telling the jury, on frequent -- on a lot of topics we are sort of telling them half the story, and I understand that sometimes the rules of evidence require that.

But, if anything, I think it's sort of either an all-or-nothing proposition on the surrogacy.

THE COURT: I have to say, I am inclined to agree with that.

MS. ESPINOSA: Can I just clarify?

THE COURT: Sure.

MS. ESPINOSA: I don't actually intend to elicit on direct examination anything about these particular messages.

THE COURT: Are the messages coming in?

MS. ESPINOSA: Yes, your Honor.

THE COURT: I mean, I think the messages are coming in. Number one, it's permissible for there to be cross about the messages. And then I do think it's really not unduly prejudicial to be asking about, sort of -- I don't want to say further surrogacy, I understand your position on that -- but surrogacy after there are all these discussions about sex surrogacy between them.

MS. ESPINOSA: Your Honor, I think that I will take another look because --

THE COURT: OK.

MS. ESPINOSA: -- there is a number of messages. If we wish to renew our application on that point, we'll raise it later.

THE COURT: That's fine. Yes, yes. Just let me know.

OK. Anything else we need to talk about today?

(Counsel confer)

MS. QIAN: Your Honor, as your Honor knows, I think we flagged this earlier. Some concerns regarding witness travel and witness availability if we are to wait until the following Monday to continue jury selection.

So we just want to flag for the court for now, that if after we go through all 30 jurors, as you see, kind of, where we are at that time, if it makes sense, we can begin the trial, if we were to have fewer number of alternates or if the government were to voluntarily reduce the number of peremptory challenges we have, so we can seat the jurors and start tomorrow, instead of waiting until Monday in just view of witness availability. We would do that.

THE COURT: You don't have to exercise challenges for sure. That is entirely up to you.

MS. QIAN: Your Honor, you had mentioned earlier that even if we don't use all our challenges, you would still have to qualify, I think, 36 jurors. I think at this point --

THE COURT: I see what you're saying.

You're saying if you affirmatively forego them, yeah, then we can limit the number of people as well as, if we reduce the number of alternates. Like, if we agree on three, for example, you know, or two, whatever it may be, then you're right, we don't have to qualify as many people.

I'm happy to have that discussion tomorrow for sure.

MS. QIAN: That's all we ask, your Honor.

MR. BALDASSARE: So, two things, Judge.

The government can reduce alternates. They do it in my view, I'm happy to talk to them about it. But what I don't want to have, I don't think it will, but what I don't want to have is a situation where we wind up, we burn through the alternates, and God forbid we lose somebody, the court has the authority -- although I've never actually understood how or why -- the court has the authority to let 11 deliberate, and we're not going to -- we would oppose that.

We want 12 deliberating, and if the government wants to reduce the number of alternates to a number that's so low that they run that risk, that can't be on us, number one.

Number two, I'm not sure I'm understanding what we're going to do. If the government says they want to give up --

THE COURT: I think their point is that if they are saying in advance, you know, we only are going to exercise four of our peremptory challenges, then we don't have to sort of qualify 36. Like, right now, the idea was, we need to get 36 where, you know, they aren't being excused for cause that we have examined.

But if the government says no, we're only going to exercise at most four peremptories, that goes right to 34. In addition, if you all can reach an agreement with respect to alternates and say, OK, we're comfortable with three

alternates -- I am comfortable with three alternates, by the way -- or even comfortable with two alternates, that, again, reduces the number of people we even need to sort of question tomorrow and get in that pool from which you're making your choices.

MR. BALDASSARE: OK. Thank you, Judge.

The last thing -- I was going to ask this tomorrow, but I may ask it tonight since we might be talking about peremptories -- is how does it work as far as -- does either side, do they bank peremptories, or is it both?

If we have two one, two one, at some point what I don't want to have happen is, if they -- if we both pass at the same time, is that the jury that we have?

THE COURT: I mean, I think so, because I don't know why. You know, what's your thinking on saving it?

So you want to skip around, and then the government passes, but you might want to exercise one more, that's the idea?

MR. BALDASSARE: Yes, I think that's right, Judge.

I mean, my question is, if I exercise two, the government exercises one, and then I say jury is acceptable, I mean, and then they exercise one, do I lose those two?

THE COURT: Well, I don't think you would be saying the jury is acceptable. I think you would just be giving up a peremptory on that round.

But, I mean, you can keep your other peremptories and see what the government does on its round and you can keep your remaining ones.

MR. BALDASSARE: Right.

But those two I lose if I say the jury is acceptable?

THE COURT: If you say, if it's your round --

MR. BALDASSARE: Right.

THE COURT: -- you have two peremptories that round, and you say, I'm passing for this round, you lose those two peremptories.

MR. BALDASSARE: OK.

THE COURT: Right.

We're all on the same page about that, right?

MR. BALDASSARE: Yes, yes.

THE COURT: All right. So why don't you be here no later than 9:45, in case the jurors get here early. If you need to discuss any issues tomorrow morning, let me know, and we'll meet earlier.

OK. All right. Thanks, have a good night.

(Adjourned to April 25, 2024, at 9:45 a.m.)